IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. ~~799~~ 57

UNITED STATES OF AMERICA,
Petitioner,

v.

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

RICHARD J. BURKE,
Attorney for Respondent,
MYRON L. SHAPIRO,
Of Counsel,
60 Wall Street,
New York 5, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. 789

UNITED STATES OF AMERICA,
Petitioner,

v.

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the Court of Appeals had jurisdiction of an appeal which raised only the question whether the District Court had complied with the judgment of this Court in *Lucchese* v. *United States*, 356 U. S. 256, directing dismissal of the denaturalization complaint.

2. If the Court of Appeals had jurisdiction of that question, whether the District Court's entry of an order of dismissal omitting the words "without prejudice" constituted compliance with this Court's judgment remanding with directions "to dismiss the complaint".

Statement

A material fact omitted from the petitioner's statement of the case (Pet. pp. 3-5) is the ground of the respondent's motion to dismiss the Government's appeal to the Court of

Appeals. Respondent's motion was expressly grounded upon lack of jurisdiction of the appeal in the Court of Appeals (Appendix 1, *infra*).

Argument

1. The petitioner does not adequately state (Pet. p. 2) the question presented by its effort to review the dismissal of its appeal to the Court of Appeals, since the dismissal was proper in any event, regardless of the merits of the appeal. The Government by its appeal sought to review in the Court of Appeals the District Court's refusal to incorporate the words "without prejudice" in its dismissal order entered pursuant to this Court's mandate in *Lucchese* v. *United States*, 356 U. S. 256. The only question, therefore, presented by that appeal was whether the District Court had or had not complied with the directions contained in this Court's remand of the case "to dismiss the complaint". But upon clear authority that was a question not within the jurisdiction of the Court of Appeals.

In *Ex parte First National Bank of Chicago*, 207 U. S. 61, where the Circuit Court of Appeals assumed the power to decide that question and give directions to the District Court in a case arising in proceedings in the District Court subsequent to the issue of a mandate from this Court, this Court said (p. 66) "The circuit court of appeals had no jurisdiction in the matter."

In *Ohio Oil Co.* v. *Thompson*, 120 F. 2d 831, cert. den. 314 U. S. 658, the Circuit Court of Appeals for the Eighth Circuit cited *Ex parte First National Bank of Chicago*, *supra* for this proposition, as well as *In Re Sanford Fork & Tool Co.*, 160 U. S. 247, and dismissed the appeal with the following language in part:

> "All these considerations demonstrate that the decision of the question presented by the appeal is not within the jurisdiction of this court. The ques-

> tion calls only for the construction and enforcement of the mandate; and it is for the district court to which the mandate is directed to construe and execute such mandate; and if that court misconstrues or refuses to enforce it or attempts to 'vary it' or 'to intermeddle with it', it is for the Supreme Court alone to construe and enforce its own mandate."

Appeals were dismissed for the same reason in *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 142 F. 2d 549 (C.C.A. 7), and *Ringhiser* v. *Chesapeake & Ohio Railway Co.*, 264 F. 2d 62 (C.C.A. 6). In the case last cited the Circuit Court of Appeals while expressly dismissing the appeal for lack of jurisdiction, took occasion to add, nevertheless, that the District Court's action was in fact in compliance with this Court's mandate.

In *Christoffel* v. *United States*, 214 F. 2d 265, cert. den. 348 U. S. 850, the Court of Appeals for the District of Columbia said:

> "We may not review action taken as required by a mandate of the Supreme Court. It is for that Court to construe its own mandate as to all matters encompassed by it. In re Sanford Fork & Tool Co., 160 U. S. 247, 255-256, 16 S. Ct. 291, 40 L. Ed. 414; Gaines *v.* Rugg, 148 U. S. 228, 238, 13 S. Ct. 611, 37 L. Ed. 432; Ohio Oil Co. *v.* Thompson, 8 Cir., 120 F. 2d 831, certiorari denied 314 U. S. 658, 62 S. Ct. 112, 86 L. Ed. 528."

Since construction of this Court's mandate was not within the jurisdiction of the Court of Appeals, that Court properly dismissed the appeal.

2. If, however, it be thought that the Court of Appeals could properly reach the merits, it is submitted that its dismissal was proper for the reasons stated by it (Pet. p. 11), viz.:

> "Upon clear authority and in reason there was no basis for Judge Inch to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellish-

ment. We have no occasion now to pass on the effect of that command upon possible later litigation."

If the Government considered this Court's judgment in *Lucchese* v. *United States*, *supra*, 356 U. S. 256, ambiguous, it could have sought amplification by timely application to this Court. But, not having done so, it had no basis for expecting the District Court to improve upon the directions of this Court, in carrying out its ministerial duty, by adding qualification or "embellishment" thereto desired by the Government but not specified by this Court.

3. The petitioner's suggestion (Pet. pp. 9-10) that the decision of the instant petition depend upon the determination of a hypothetical petition for certiorari not yet filed in *United States* v. *Costello* (decided by the Second Circuit February 17, 1960) is altogether without justification, since the questions presented by the two cases are totally different. The suggestion stems from the petitioner's persistent misunderstanding of the limited nature of the questions here presented. What it is seeking seems really to be an advisory opinion as to the *effect* of the dismissal order, although no case or controversy raising that question is now pending.

As the Court of Appeals pointed out, in the instant case the question of the effect of the dismissal order upon a possible second suit (not yet brought) is not reached. Conversely, that question had to be decided in the *Costello* case, and the Court of Appeals there held that the similar refusal of the District Court in that case to add the words "without prejudice" to the dismissal order (entered in accordance with this Court's judgment in *Costello* v. *United States*, 356 U. S. 256) was ineffective to bar a second suit against Costello.

But in the instant case the question is at best only whether the District Court complied with this Court's mandate, if it is first determined that the Court of Appeals

had jurisdiction to consider that question. These questions were not before the Court of Appeals in the *Costello* case, and obviously will not be presented by the hypothetical petition for certiorari possibly to be filed by Costello to review that Court's determination that the order which was entered did not constitute a bar to a second action.

The petitioner unsuccessfully sought in the Court of Appeals to interfwine these two dissimilar cases by moving in that Court for an enlargement of time in the instant case (Appendix 1, *infra* p. 9) until after the termination of *Costello*, but that motion was denied (Appendix 2, *infra*) simultaneously with the dismissal of its appeal, as was its motion for leave to file an untimely petition for rehearing after the *Costello* decision (Pet. p. 10, footnote).

It applied to Mr. Justice Harlan for an extension of time to file this petition for a writ of certiorari (Pet. p. 2) saying:

> "Thus, the decision in the *Costello* case will have an important bearing on the question of whether to seek review of the order dismissing the appeal in this case. If it should be held that the order of dismissal in *Costello* barred a second suit, then the order here could have a continuing effect which may be deemed important enough to future denaturalization proceedings, in this case and others, to justify seeking further review by this Court. For this reason this extension of time is sought until March 14, 1960, by which time, it is hoped, the Second Circuit will have decided the *Costello* case."*

The application was granted with the following endorsement by Mr. Justice Harlan: "Although I can see very little procedural justification for this application, I am constrained to grant the extension sought in the absence of any showing by the respondent that he will be prejudiced thereby."

* The "important bearing" of the Court of Appeals *Costello* decision on the question of whether to file this petition seems now to have been forgotten.

But now the petitioner seeks more than mere delay; it asks that its petition, demonstrated *supra* to be without merit, be granted if Costello's petition is granted, and the two cases heard together (Pet. pp. 9-10). Plainly such a disposition would prejudice the respondent, since he is entitled to an independent consideration of the merits of the petition for certiorari filed herein, rather than a decision depending entirely upon a determination which may be made to review another dissimilar case.

CONCLUSION

Since the Court of Appeals' dismissal of the Government's appeal was proper, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RICHARD J. BURKE,
Attorney for Respondent.
MYRON L. SHAPIRO,
Of Counsel.

April 1960.

Appendix 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

against

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE,
Appellee.

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of RICHARD J. BURKE sworn to the 8th day of October, 1959 and the exhibits annexed thereto, a motion will be made before this Court by the undersigned at the United States Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, on the 13th day of October, 1959 at 10:30 A.M. in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the appeal herein on the ground that this Court lacks jurisdiction thereof.

Dated, New York, October 8th, 1959.

Yours, etc.,

RICHARD J. BURKE
Attorney for Appellee

To:

Hon. CORNELIUS W. WICKERSHAM, JR., Esq.
United States Attorney for the
Eastern District of New York
United States Courthouse
271 Washington Street
Brooklyn 1, N. Y.

UNITED STATES COURT OF APPEALS
For the Second Circuit

United States of America,

Appellant.

against

Gaetano Lucchese, also known as Thomas Luckese, also known as Thomas Lucase, also known as Thomas Arra, also known as Thomas Luchese,

Appellee.

State of New York)
County of New York) ss.:

Richard J. Burke being duly sworn, deposes and says: I am the attorney for the above-named appellee, and I make this affidavit in support of a motion to dismiss the appeal herein on the ground that this Court lacks jurisdiction thereof.

The Supreme Court of the United States in its opinion herein reported at 356 U. S. 256, granting a petition for a writ of certiorari and reversing the judgment of this Court, on April 7, 1958, remanded the case to the District Court "with directions to dismiss the complaints."

A copy of that judgment of the Supreme Court now on file in the office of the Clerk of the District Court for the Eastern District of New York, certified by the Clerk of the Supreme Court of the United States as of May 9, 1958, is annexed hereto marked Exhibit A. On July 16, 1959 the United States Attorney submitted for signature to the United States District Court a proposed "Order

on Judgment" providing for the dismissal of the complaint "without prejudice". On the same day deponent submitted a proposed "Order on Judgment" which was identical with the Government's proposed order except that it omitted the words "without prejudice." This latter order was the one signed by the District Judge, and a copy is annexed hereto marked Exhibit B.

The Government moved before the District Court on July 24, 1959 to resettle the Order on Judgment so as to include the words "without prejudice", and that motion was argued and denied.

On September 11, 1959 the Government appealed to this Court from so much of the Order on Judgment as failed to specify that the dismissal was "without prejudice" and also from the denial of its motion to resettle that order.

The Government has moved before this Court for an enlargement of time in connection with that appeal, and deponent has submitted an affidavit in opposition thereunto, annexed to which is a copy of the Government's notice of appeal, to which the Court is respectfully referred, since both motions are being heard at the same time.

The Supreme Court not having included the words "without prejudice" in its opinion and judgment, the District Court has also refrained from using such language in its order entered in compliance with the Supreme Court mandate. The present appeal therefore concerns itself solely with the question of whether the District Court has properly construed and obeyed the mandate of the Supreme Court. It is well settled, as the cases cited in the memorandum submitted herewith demonstrate, that that question is not within the jurisdiction of this Court. It is for the Supreme Court alone to construe and

enforce its mandate. Therefore this appeal should be dismissed.

Sworn to before me this 8th day of October, 1959.

RICHARD J. BURKE

RUTH FLAX
Notary Public, State of New York
No. 03-6331000
Qualified in Bronx County
Commission Expires March 30, 1960

EXHIBIT A

SUPREME COURT OF THE UNITED STATES

No. 450. OCTOBER TERM, 1957

13052

GAETANO LUCCHESE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

This cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Second Circuit, and was duly submitted.

On consideration whereof, it is ordered and adjudged by this court that the judgment of said United States Court of Appeals, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of New York with direction to dismiss the complaint. An affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings. The affidavit must be filed with the complaint when the proceedings are instituted. *United States* v. *Zucca*, 351 U. S. 91, 99-100.

April 7, 1958

A true copy

John T. Fay,

(SEAL)

Test:

Clerk of the Supreme Court of the United States

Certified this Ninth day of May 1958

By .....

Deputy

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Civil Action No. 13052

UNITED STATES OF AMERICA,

Plaintiff,

against

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE,

Defendant.

ORDER ON JUDGMENT

At Brooklyn, New York, in said District, on the 16th day of July, 1959.

Plaintiff having appealed to the United States Court of Appeals for the Second Circuit from an Order of this Court dated and entered on October 15th, 1956, dismissing the Complaint herein without prejudice to plaintiff's right to institute a proceeding to denaturalize defendant upon the filing of an Affidavit showing good cause therefor, and that Court having reversed said Order by Judgment dated and entered on June 17th, 1957, and defendant having thereafter petitioned the Supreme Court of the United States for a Writ of Certiorari, and that Court having granted same and then rendered Judgment on April 7th, 1958, and a certified copy of said Judgment having been duly filed by the Clerk of this Court on May 12th, 1958.

Now, on motion of Richard J Burke, attorney for the defendant, it is

ORDERED, ADJUDGED AND DECREED that said Judgment of the Supreme Court of the United States be, and the same hereby is made the Judgment of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that the Complaint herein be, and the same hereby is dismissed without costs to either party.

ROBERT INCH
United States District Judge.

Appendix 2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE,

Appellee.

Appellant's motion to extend time denied. See memorandum on appellee's motion to dismiss, filed herewith.

C. E. C.
U. S. C. J.
J. J. S.
U. S. D. J.

October 15, 1959